

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of

Rural Telecommunications Group, Inc.,)	
Petition for Rulemaking To Impose a)	
Spectrum Aggregation Limit on all)	RM No. 11498
Commercial Terrestrial Wireless)	
Spectrum Below 2.3 GHz)	

Reply Comments of United States Cellular Corporation

United States Cellular Corporation ("USCC") hereby submits its Reply Comments in the above-captioned proceeding. The comments filed on both sides of this issue demonstrate both its importance and the need for the newly constituted Federal Communications Commission ("FCC" or "Commission"), early in 2009, to adopt a Notice of Proposed Rulemaking ("NPRM") regarding spectrum cap issues. The FCC should explore these issues carefully, with the technical rigor necessary to consider a change in its spectrum aggregation rules. However, we are confident that such a review will result in the FCC concluding that it is now necessary to re-impose limits on concentrations of wireless spectrum.

I. USCC and other Commenters Have Made A Strong Case for A Spectrum Cap.

USCC, in our Comments, referring to the data ably assembled by Rural Telecommunications Group ("RTG"), demonstrated that the FCC's post-2003 spectrum "screens" have not been an obstacle to what we characterized as the "massive consolidation" of the wireless industry.¹ Thus, USCC concluded there should be some form of upper limit on

¹ Comments of United States Cellular Corporation ("USCC Comments"), pp. 2-4.

spectrum aggregation by market, while noting that there is relatively little newly allocated wireless spectrum below 3 GHz remaining to be auctioned.²

USCC also concluded that the FCC has to deal with the imperative that very different wireless spectrum bands now lumped together within the Commission's spectrum screens should not be treated the same, thus allowing the existence of unpaired, higher frequency, and hence less valuable Broadband Radio Service ("BRS") spectrum in a given market to serve as a "shield" for a carrier's acquisition of more cellular, PCS, AWS-1, or 700 MHz spectrum. USCC also urged the FCC to apply its Herfindahl-Hirschman Index ("HHI") "screen" to acquisition of "greenfield spectrum" at auction as well as to proposed mergers and acquisitions. Greenfield spectrum, when acquired by already dominant carriers, can also be a significant barrier to competition.³ And lastly, USCC called attention to the unprecedented dominance of the wireless industry by two carriers, namely Verizon Wireless and AT&T Mobility, as exemplified by recent auctions and mergers, and urged the Commission to focus on the unique problem posed by that dominance, with all its implications for roaming, handset acquisition and every other aspect of wireless competition.⁴

These arguments are supplemented and strengthened by those of other carriers. A group of small telephone companies make a powerful argument to the effect that in rural areas, large carriers have used their size and market power to force rural carriers to accept non-reciprocal roaming agreements on a "take it or leave it" basis.⁵ They further argue that the market power of the dominant carriers has been magnified by the absence of a spectrum cap, which has enabled

² USCC Comments, pp. 6-7

³ USCC Comments, p. 8.

⁴ Ibid, pp. 8-10.

⁵ See, e.g., Comments of Pine Belt Communications, Inc. ("Pine Belt Comments"), pp. 2-3.

the dominant carriers to "stockpile" spectrum and preclude smaller carriers from acquiring it.⁶ Without a spectrum cap, this imbalance will continue and likely become even more pronounced, thus making it impossible for smaller carriers to compete.

This problem is illustrated by the comments of regional PCS licensee NTELOS, Inc.⁷ NTELOS documents its conscientious buildout and network upgrade efforts in Virginia and West Virginia, as well as its efforts at offering a "wide array of voice and data plans."⁸ However, despite its best efforts, NTELOS remains at a potentially impossible disadvantage vis-à-vis its dominant competitor Verizon Wireless, owing to the disparity in spectrum holdings between those companies.⁹ A disparity of four or five to one in available spectrum is likely not sustainable over the long haul, particularly as wireless evolves toward more spectrum-intensive uses. We believe that the FCC has a responsibility to ensure that these disparities at least do not grow worse. The National Telecommunications Cooperative Association and Rural Independent Competitive Alliance, representing small wireline carriers providing wireless service, echo and document those spectrum availability concerns.¹⁰ These comments, taken together, provide a powerful demonstration that the survival of wireless competition will be closely linked to availability of spectrum to small and mid-sized carriers.

Moreover, the issue of a wide dispersion of spectrum is not merely a matter of competition policy, important though that is. As Leap Wireless points out, the FCC is legally obligated to take into account the requirement set forth in Section 309(j)(3)(B) of the Communications Act [47 U.S.C. §309(j)(3)(B)] that the Commission adopt spectrum policies

⁶ Ibid.

⁷ Comments of NTELOS Inc. ("NTELOS Comments"), pp. 3-7.

⁸ Ibid.

⁹ Ibid., pp. 5-6.

¹⁰ See Comments of National Telecommunications Cooperative Association, pp. 2-5; Comments of Rural Independent Competitive Alliance, pp. 2-4.

that "avoid[] excessive concentration of licenses" and "disseminate licenses among a wide variety of applicants" – a statutory responsibility the FCC has studiously avoided in recent years with respect to wireless licensing.¹¹

Leap notes the impact of this failure on its ability to serve its largely low income and minority customers owing to its inability to obtain necessary spectrum at reasonable prices¹² and, like USCC, draws attention to the ominous trend toward wireless concentration during the past decade.¹³

The comments in support of a spectrum cap provide an irrefutable demonstration of the growing threat to competition and other components of the public interest arising from essentially unrestrained spectrum acquisition by the largest wireless carriers. Conversely, they demonstrate the need for developing new approaches to protecting the ability of mid-sized and small carriers to provide the kind of competition in the future which has served the wireless industry and the country so well in the past. In considering this issue we would suggest that the FCC consider an adaptation of the approach taken when it created the PCS service.¹⁴ In the 1994 PCS Order, the FCC, contrary to its decision in 2003, concluded that the "competitive delivery" of PCS service required "an overall cap on the amount of PCS and cellular spectrum any one market entrant could hold."¹⁵ That judgment was based on a determination about the amount of spectrum, namely 40 MHz, which "each licensee would require" to "provide broadband PCS service."¹⁶ In the PCS Order, the FCC balanced carriers' needs for spectrum against the value of new entrants which would be able to participate in the provision of PCS on a national scale, by

¹¹ See Comments of Leap Wireless International, Inc. ("Leap Comments"), p. 6.

¹² Leap Comments, pp. 1-3.

¹³ Ibid., pp. 4-6.

¹⁴ See, In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, Memorandum Opinion and Order, 9 FCC Rcd 4957 (1994) ("PCS Order").

¹⁵ Ibid., ¶¶ 66, 67.

¹⁶ Ibid., ¶ 66.

adapting a strict market-by-market limitation on spectrum aggregation.¹⁷ Obviously, market conditions have changed since 1994. But the need for the FCC to undertake a similar type of searching inquiry regarding the requirements of competition has not. Nor has the need for carriers to emerge which can challenge the top four carriers, and especially the top two. We urge the FCC to undertake that inquiry.¹⁸

A model of the type of inquiry we have in mind was carried out by the FCC in 2002 when it set for hearing the proposed acquisition by EchoStar of Hughes Electronics Corporation, then owned by General Motors Corporation, and EchoStar's main DBS competitor. The EchoStar HDO analyzed the proposed merger in detail, taking into account such factors as spectrum efficiency, spectrum policy, and licensing diversity, as well as the public interest benefits and harms of the proposed transaction in light of relevant antitrust precedent.¹⁹

The Commission concluded it could not approve the merger without a hearing. We would note that the FCC, in the EchoStar HDO, praised the PCS spectrum cap in the following terms:

"Later, the Commission took actions to further its competitive policies by establishing a spectrum cap for CMRS. In doing so, the Commission found that such action would promote pro-competitive ends in the CMRS markets and 'discourage anticompetitive behavior while at the same time maintaining incentives for innovation and efficiency.' The initiatives adopted by the Commission in the CMRS markets have resulted in a strong growth of competition in those markets, leading to the Commission's recent action to sunset the spectrum cap rule, and not instead on case by case analysis of the competitive effects of

¹⁷ Ibid., ¶138.

¹⁸ We note that a comprehensive review of spectrum screen issues has also been endorsed by Sprint Nextel, indicating broad acceptance of the need to examine these issues. See, "Sprint Nextel, AT&T Ask FCC To Reject PISC Petition," Telecommunications Reports, December 19, 2008.

¹⁹ See, In the Matter of Application of EchoStar Communications Corporation (A Nevada corporation), General Motors Corporation, and Hughes Electronics Corporation (a Delaware corporation), (Transferors) and EchoStar Communications (a Delaware Corporation) (Transferee), CS Docket No. 01-348, Hearing Designation Order, 17 FCC Rcd 20559 (2002) ("EchoStar HDO"), at ¶¶ 28-55, ¶¶ 56-96, ¶¶ 99-259.

particular transactions to protect the public interest (footnote omitted) (emphasis added).²⁰

We submit that the FCC was right about the spectrum cap in 2002, but that contrary to its expectations, case by case analysis has not worked to protect the public interest. It is time for another approach.

II. Proponents of the Current Approach To Spectrum Aggregation Have Not Made Their Case.

The FCC's current approach to spectrum aggregation finds its supporters mainly among the largest wireless carriers and wireless trade associations. However, none of the arguments they raise is persuasive.

Both Verizon Wireless and AT&T Inc. argue, in essence, that because the FCC's "flexible" approach to evaluating spectrum acquisition as a consequence of mergers and auctions is supposed to protect competition and because the FCC has validated every merger it has evaluated as being pro-competitive that therefore all must be well from the standpoint of competition.²¹ They both also rely on the FCC's most recent and previous competition reports to state that there is no empirical proof that concentration is increasing or that competition is threatened.²² Verizon Wireless also argued that under a spectrum cap it might be required to forego spectrum efficient expansions of its operations which could result in higher costs to consumers.²³ And Verizon Wireless maintains that to the extent concentration is, in fact, increasing, that increased concentration does not necessarily mean decreased competition.²⁴

²⁰ Ibid., ¶88.

²¹ See, e.g. Comments of Verizon Wireless, pp. 11-22; Comments of AT&T, Inc., 2-13. The Wireless Communications Association International, Inc. and Telecommunications Industry Association essentially agree with those points.

²² Verizon Wireless Comments, pp. 9-14; AT&T Comments, pp. 2-9.

²³ Verizon Wireless Comments, pp. 22-23.

²⁴ Verizon Wireless Comments, pp. 14-17, and Katz Statement.

Concerning those varying and (to some degree) conflicting arguments, we would note the following. First, there is clear pre-2007 evidence, cited by the RTG Petition, that concentration is increasing, particularly in the largest and smallest wireless markets.²⁵ Second, it is also clear that the trend toward concentration has increased in 2007 and 2008, as is obvious from the many wireless mergers of the past two years.²⁶ During that time, the AT&T-BellSouth, AT&T-Dobson, AT&T-SunCom, AT&T-Aloha, Verizon Wireless-RCC, and many other "minor" mergers involving those companies have taken place, Verizon Wireless recently secured FCC authority to acquire Alltel, and AT&T has proposed to acquire Centennial Communications.²⁷ Surely these mergers will have a considerable effect on the HHI as measured by county, as RTG proposes, or by CMA, BTA, or EA, as will be reflected in the next competition reports. It is disingenuous to pretend otherwise. Moreover, hair splitting arguments about HHI in certain markets obscure the stark facts of Verizon Wireless and AT&T's national domination of the CDMA and GSM markets respectively, as reflected in their number of customers, as summarized in USCC's Comments at pp. 8-9.

Verizon Wireless' argument that a spectrum cap will reduce efficiency assumes, without evidence, that the cap will be set at such a low level that efficient network design will be compromised. The proper level for a spectrum cap would only be set by the FCC after the proceeding in which the Commission would take public comment concerning this issue and would apply its own economic resources in studying it. A spectrum cap can certainly balance the spectrum needs of national wireless carriers against the need to preserve competitive balance in the industry.

²⁵ Rural Telecommunications Group Petition For Rulemaking ("RTG Petition"), pp. 8-13.

²⁶ RTG Petition, pp. 8-9.

²⁷ See, Public Notice, "AT&T Inc. and Centennial Communications Corp. Seek FCC Consent to Transfer Control of Licenses, Leasing Arrangements, and Authorizations, W.T. Docket No. 08-246, DA-2713, released December 16, 2008.

Third, Verizon Wireless' attempt to argue that market concentration is not necessarily anti-competitive should be a red flag to the FCC, as it contradicts the FCC's traditional "metrics" for measuring competition, which consider concentration to the exclusion of other factors. This argument is itself a good reason for opening a proceeding on this subject. Finally, arguments limited to market share miss other aspects of the dominance exercised by these carriers, particularly those involving roaming and handset acquisition, in which the market power of these carriers is increasingly evident.

CTIA's Comments warrant a brief response. We agree with CTIA that it would be highly desirable if the FCC made available more spectrum to wireless carriers below 3 GHz.²⁸ However, CTIA does not propose any specific frequency bands as being available for allocation in its Comments and we know of none other than those already scheduled for auction.²⁹ CTIA thus does not provide any "real world" reason why the FCC should not open a proceeding to consider how spectrum cap requirements could be used to promote Section 309(j) diversity at a time when there are so few newly allocated acquisition opportunities.

Lastly, Union Telephone Company objects to any spectrum cap, essentially because it exceeded the applicable 95 MHz "screen" in certain counties as a consequence of its spectrum acquisitions in Auction 73.³⁰ It believes that a cap would be undesirably inflexible.³¹ Union Telephone's comments do call attention to the need for flexibility and occasional waivers in enforcing a spectrum cap. Permitting a small carrier to exceed an applicable cap by a small amount in a rural market may well serve the public interest, as it presumably did in this instance. USCC would have no objection to such waivers. However, an occasional, fact specific waiver is

²⁸ Comments of CTIA ("CTIA Comments"), pp. 2-9.

²⁹ USCC Comments, p. 6 n. 18.

³⁰ Comments of Union Telephone Company, ("Union Telephone"), pp. 8-11.

³¹ Ibid., pp. 1-8.

very different from having a set of rules which have permitted the massive consolidation of the wireless industry, an unfortunate situation which the next FCC will have to confront.

CONCLUSION

For the foregoing reasons and those given in our Comments, the FCC should adopt a notice of Proposed Rulemaking and take action to preserve wireless competition by restricting the dominant carriers ability to acquire additional spectrum.

Respectfully submitted,

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